Committee on Subsidies and Countervailing Measures[1]

Status

The Agreement on Subsidies and Countervailing Measures (Subsidies Agreement) provides rules and disciplines for the use of government subsidies and the application of remedies – through either WTO dispute settlement or countervailing duty (CVD) action – to address subsidized trade that causes harmful commercial effects.[2] The Agreement divides subsidy practices among three classes: prohibited (red light) subsidies; permitted yet actionable (yellow light) subsidies; and permitted, non-actionable (green light) subsidies. Export subsidies and import substitution subsidies are prohibited. Green light subsidies consist of certain circumscribed government assistance granted for industrial research and development (R&D), regional development, or environmental compliance purposes. All other subsidies are permitted, yet are actionable (through CVD or dispute settlement action) if they are (i) limited to a firm, industry or group thereof within the territory of a WTO Member (i.e., "specific" subsidies) and (ii) found to cause adverse trade effects, such as material injury to a domestic industry or serious prejudice to the trade interests of another WTO Member. However, certain subsidies, referred to as dark amber subsidies, are presumed to cause serious prejudice: subsidies to cover an industry's operating losses; repeated subsidies to cover a firm's operating losses; the direct forgiveness of debt (including grants for debt repayment); and when the *ad valorem* subsidization of a product exceeds five percent. In such cases, if challenged in a WTO dispute settlement proceeding, the subsidizing government has the burden of showing that serious prejudice has not resulted from the subsidy.[3]

In 1999, a review was conducted under Article 31 of the Agreement with respect to whether to extend beyond 1999 the application of Article 6.1 (the dark amber subsidies) and Articles 8 and 9 (the green light subsidies). Because a consensus could not be reached on whether or how these provisions might be extended beyond their five-year period of provisional application, they expired at the turn of the year.

Assessment of the First Five Years of Operation

Rules and disciplines covering industrial subsidies have evolved over time in the multilateral trading system to ensure that the artificial competitive advantages which they can confer do not disrupt the market signals which guarantee the most efficient allocation of resources, both within and among countries – forces at the

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[1]For further information, see also the Joint Report of the United States Trade Representative and the U.S. Department of Commerce, *Subsidies Enforcement Annual Report to the Congress*, February 2000.

[2]Another WTO body which carried out work of relevance to subsidies disciplines in 1999 is the Committee on Trade and Environment (CTE). The United States played a leading role in the CTE, and elsewhere, in identifying areas where reduction or elimination of subsidies can yield both trade and environmental benefits. A clear example is in the fisheries sector, where subsidies have played a major role in exacerbating the problems of overcapacity and over-fishing. The United States has worked closely with like-minded countries to build a consensus for the development of stronger WTO disciplines to address this problem. The United States will continue to pursue this initiative, as well as to explore other opportunities where strengthened subsidies disciplines can yield trade and environmental benefits.

[3]As explained below, the green light and dark amber provisions mentioned here are no longer in effect.

heart of the generation of wealth for producers, consumers and workers. The WTO disciplines subsidies in order to prevent the erosion of comparative advantage and the undermining of market access expectations conferred through reciprocal concessions to reduce tariffs and other barriers at the border. In short, subsidy rules help to make the field of competition more even, so private actors need not worry about having to compete with government treasuries. At the same time, however, WTO subsidy rules recognize that all governments do – indeed, must – intervene in their economies in some fashion to pursue legitimate objectives for the society at large. The WTO rules, accordingly, are intended to prohibit or discourage the most distortive kinds of subsidies, and to encourage governments to use less distortive subsidies in order to achieve the broader social or economic objectives of interest to them.

This historical balance has served U.S. interests well. The orientation of multilateral subsidy rules has tended to reflect the balances struck within the United States on these same issues: a low toleration for the more distortive types of government intervention, yet with a flexibility which permits a variety of approaches to address the different social, economic, technological, developmental and environmental needs of a Member. It is also a balance that has served the multilateral system well, e.g., during the financial crisis, it provided a model which discouraged the kind of targeted industrial policies and non-commercial government support that exacerbated the crisis, but saved room for the broadly available industry and worker assistance that could be important in overcoming the crisis. Finally, it is a framework which holds promise for creating greater complementarities between the goals of trade policy and environmental policy, as the United States identifies sectors in which the reduction or elimination of subsidy practices can alleviate both adverse trade and environmental effects.

The Uruguay Round Subsidies Agreement brought important new disciplines to address the more egregious subsidy practices, and for the first time extended the coverage of disciplines from the 25 to 30 signatories of the Tokyo Round Subsidies Code to all 135 Members of the WTO. Its remedies and methodological concepts reflect, in most instances, the very concepts and standards which the United States developed over the course of decades in administering its own anti-subsidy trade statutes. With some exceptions, the outcome of subsidy-based disputes brought since entry into force of the WTO has tended to reinforce the strict standards which the United States believed at the conclusion of the Uruguay Round were embodied in the Agreement. Even with the expiration last year of certain important elements of the Agreement, it continues to offer a strong yet balanced solution to the impact of subsidies on international trade.

Major Issues in 1999

The Committee held two regular and two special meetings in 1999. In addition to its routine activities concerned with clarifying the consistency of WTO Members' domestic laws, regulations and actions with Agreement requirements, the Committee gave special attention to reviewing general subsidy notifications and to the process by which such notifications are made to and considered by the Subsidies Committee. Particular attention was devoted to the review of 1998's new and full subsidy notifications, including that of the United States,[4] which is the second series of such notifications made since entry into force of the WTO. Pursuant to its own "built-in agenda," as set forth in Article 31, the Committee also conducted its review of the operation of the green light and dark amber rules. Further information on these various activities is provided below.

Review and Discussion of Notifications: Throughout the year, Members submitted notifications of (i) new

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[4]As noted in last year's report, the 1998 notification of the United States included for the first time information on over 200 measures at the sub-federal level. This innovation was welcomed by many other Members, and has permitted the United States to probe for or provide information about similar measures maintained at the sub-central government level in other WTO Members' territories.

or amended CVD legislation and regulations; (ii) CVD investigations initiated and decisions taken; and (iii) measures which meet the definition of a subsidy and which are specific to certain recipients within the territory of the notifying Member. Notifications of CVD legislation and actions, as well as updating subsidy notifications, were reviewed and discussed by the Committee at both of its regular meetings. New and full subsidy notifications for the 1998 reporting period were, in turn, considered at the two special meetings. In reviewing notified CVD legislation and subsidies, the Committee procedures provide for the exchange of written questions and answers to clarify the operation of the notified measures and their relationship to the obligations of the Agreement. For the first time, the Committee agreed to special procedures for conducting its review of full subsidy notifications in order to allow adequate time for a written exchange of questions and answers prior to the meeting, thereby permitting a more probing and free-flowing discussion of issues at the meeting itself.

Among the notifications of CVD laws and regulations reviewed in 1999 were those of Argentina, Australia, Dominica, Egypt, the European Union (EU), Fiji, Ghana, Indonesia, Jamaica, Latvia, Maldives, Trinidad and Tobago and the United States (including the most recent substantive CVD regulations of the Department of Commerce). As for CVD measures, reports were submitted by 68 Members last year, and the Committee reviewed actions taken by Argentina, Barbados, Canada, the EU, Egypt, Mexico, Peru, South Africa, Sri Lanka, the United States, and Venezuela. With respect to subsidy notifications, the Committee examined the notifications of 36 Members (counting the 15 member states of the EU as one). Most were new and full notifications submitted for 1998, the beginning of the second triennial notification cycle under the Agreement, but update notifications for 1997 and 1999 were also reviewed. The table contained in Annex II shows the WTO Members whose subsidy notifications were reviewed by the Committee in 1999.

The United States has long pressed not only for better compliance with subsidy notification obligations, but also for improvements aimed at streamlining the notification process. In 1999, the Subsidies Committee considered an EU proposal drawn from earlier suggestions of the United States and other Members that new and full notifications be made biennially rather than triennially, and that updating notifications be eliminated. Such a change, the United States has argued, would not only lessen administrative burdens, but would rationalize the review process by permitting a Member to shift resources from preparing its notification in one year to reviewing notifications in the next. This would, in fact, heighten transparency through better organization and fewer delays. Whereas many delegations expressed interest in or support for this proposal, a number of developing countries requested additional time to study the idea. The Committee will continue to consider this and other proposals for streamlining the notification process in 2000.

Sunsetting of Green Light & Dark Amber Rules: When the Subsidies Agreement was negotiated, the green light and dark amber rules were considered to be the most novel, and therefore unpredictable, aspects of the Agreement. As a result, the Agreement provided that these rules should apply only for the first five years. Under Article 31 of the Agreement, the Subsidies Committee was charged with reviewing their operation with a view toward extending them for a further period, with or without modifications, but the Agreement made clear that the provisions would expire at the end of 1999 unless an explicit decision was made to keep them in force.

Pursuant to the URAA, the Administration conducted extensive consultations on this issue with a broad spectrum of interested U.S. parties throughout 1998 and 1999. On the basis of those consultations, the United States took the position that it could join a consensus to extend the application of Articles 6.1, 8 and 9, as written, for another reasonable period of time (e.g., up to another five years). This was consistent with the vast majority of the advice that the United States had received from its statutorily-mandated advisory committees, other private sector and state/local government representatives and interested members of the Congress. It reflected the mixed views which the United States has always held about the value and danger of these provisions, and the relative lack of experience with their use since establishment of the WTO.

Although many WTO Members supported an extension, a number of developing country Members asserted that the provisions worked exclusively to the advantage of developed countries, and opposed an extension unless certain modifications were made to these provisions, other parts of the Subsidies Agreement and even other WTO agreements. The United States argued that the Article 31 issue had to be judged on its own merits, and the United States could not accept changes which would substantively dilute subsidy or other WTO disciplines as a price for extension. Other Members expressed similar views, while a handful of developing countries voiced doubts that there could be any basis acceptable to them for extending the application of Articles 6.1, 8 and 9. Accordingly, the Committee was unable to take a decision on this matter by the end of 1999, and the provisions automatically lapsed as of January 1, 2000.

Pursuant to the requirements of the URAA, USTR plans to submit by no later than June 30, 2000, a separate report to the Congress identifying the provisions of U.S. law that are affected by these developments. As set forth in section 251 of the URAA, the green light provisions of U.S. CVD law will no longer have effect as of July 1, 2000, unless new legislation is enacted before that date which alters that status.

Work for 2000

Implementation will continue to be the hallmark of Subsidies Committee work this year. First, as noted above, the United States will continue to work towards agreement on ways to streamline the burdens of subsidy notification for all WTO Members without taking away from the substantive benefits of that obligation. Second, certain developing country Members raised concerns in both the Committee and the Third Ministerial preparatory process last year about the problems of Subsidies Agreement implementation. The United States agrees that the Committee should assume a more active role in addressing the variety of pending, and impending, implementation issues. Among these, from a U.S. perspective, are certain leading examples:

< *IMPLEMENTATION OF ARTICLE 27.3:* On January 1, 2000, the phase-out period ended for all developing countries except the least-developed with respect to "subsidies contingent . . . upon the use of domestic over imported goods," measures which are prohibited under Article 3.1(b) of the Agreement. Without prejudice to any Member's dispute settlement rights, the United States believes that the Committee should monitor Members' implementation efforts in order to ensure compliance with this obligation.

< *IMPLEMENTATION OF ARTICLE 27.2/27.4:* In the course of the past year, many developing countries have raised concerns about their ability to meet the transitional obligations in various WTO Agreements by the prescribed deadlines. Under the Subsidies Agreement, the transition period for most developing countries to phase out their export subsidies expires on January 1, 2003. Although the United States and other Members have asked certain developing countries to report on the status of their phase-out plans during the review of general subsidy notifications under Article 26, little information has typically been supplied in response. Notwithstanding that the deadline is roughly three years away, and individual requests for extension need not be made until January 1, 2002, the Agreement does prescribe that these subsidies are to be phased out "in a progressive manner" and within a shorter period where "the use of such . . . subsidies is inconsistent with [a country's] development needs." Given this, there are reasonable grounds for the Committee to consider this year creating a special reporting and monitoring process to facilitate these phase-outs.

< *ARTICLE 27.6 REVIEW:* The Subsidies Agreement provides that a developing country which has reached 3.25 percent of world trade in a given product over two consecutive years must accelerate

the phase-out of its export subsidies on that product. The product scope is defined as a section heading of the Harmonized System nomenclature, and application of this provision can be triggered either by a notification made by the developing country or a computation done by the WTO Secretariat at the request of another Member. Pursuant to Article 27.6 of the Agreement, the Subsidies Committee began reviewing the operation of this provision at the end of last year. Although the provisions have yet to be invoked, the United States believes that a number of issues relating to the scope, structure and likely operation of these provisions are topics worthy of more rigorous consideration.

- *OPERATION OF ANNEX VII:* Annex VII to the Agreement identifies two specific groups of developing countries which receive treatment more generous than that given to other developing countries with respect to both export subsidy obligations and the application of CVD rules.[5] Over the past year, a number of developing countries have raised concerns about the scope and operation of Annex VII. While there is no justification for arbitrarily expanding the scope of this Annex, in terms of either countries covered or the exceptions provided from normal Agreement rules and disciplines, some legitimate questions have been raised about the manner in which Annex VII (as it is currently written) may have operated or been interpreted. The United States agrees that the Committee could profitably review the status and operation of this Annex, with the possibility of drawing up recommendations for improvements and clarifications should any be identified.

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[5] If a developing country WTO Member is identified in Annex VII, Article 27 of the Agreement provides it with more generous treatment than is provided for other developing countries, *i.e.*, they are not immediately subject to export subsidy phase-out requirements and, for a limited remaining period, their exports benefit from higher *de minimis* subsidy rates in countervailing duty investigations. Annex VII identifies two groups of the poorest developing countries: (i) the least developed countries as designated by the United Nations and (ii) certain other specifically named countries whose annual GNP per capita was below $1000 at the conclusion of the Uruguay Round negotiations. The specifically named countries are: Bolivia, Cameroon, Congo, Côte d'Ivoire, the Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, the Philippines, Senegal, Sri Lanka and Zimbabwe. Annex VII indicates that this latter group of countries shall continue to benefit from the more generous treatment described here until such time as their annual per capita GNP reaches $1000. Over the past five years, World Bank data has indicated that the annual per capita GNP of the Dominican Republic, Egypt, Guatemala, Indonesia, Morocco and the Philippines rose above $1000 (although, for some, it has since dropped below $1000).